BYU Law Review

Volume 1988 | Issue 2 Article 6

5-1-1988

Expanding on Borrowed Time: Agency Holding Corp. v. Malley-Duff & Associates

Michael H. Coons Sr.

Expanding on Borrowed Time: *Agency Holding Corp. v. Malley-Duff & Associates*

All too often, Congress creates a cause of action, such as the civil enforcement provision of the Racketeering Influenced and Corrupt Organizations Act[1] (RICO), without providing an express statute of limitations.[2] Yet the courts have not allowed these causes of action to go unlimited.[3] The settled practice is to borrow a limitations period from an analogous state cause of action and apply it to the federal cause of action, unless the state period is inconsistent with federal law or policy.[4] This practice is sometimes referred to as the "borrowing rule."

Unfortunately, the process of borrowing an analogous state limitations period in civil RICO actions has caused a number of "litigation-creating complexities."[5] In the recent case of *Agency Holding Corp. v. Malley-Duff & Associates*[6] (*Malley-Duff II*),

---

1. RICO's civil enforcement provision provides that "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." 18 U.S.C. § 1964(c) (1982).

2. Other examples include causes of actions alleging misrepresentation in the sale of securities, General Rules and Regulations, Securities Exchange Act of 1934, 17 C.F.R. § 240.10b-5 (1978) (promulgated pursuant to section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j (1982)); actions for copyright infringement, 17 U.S.C. § 407 (1982); and employment discrimination, Civil Rights Act of 1964, § 706(d), 42 U.S.C. § 2000e-5 (1982).

3. Wilson v. Garcia, 471 U.S. 261, 271 (1985).

4. *Id.* at 266-67; Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 465 (1975).

5. Auto Workers v. Hoosier Corp., 383 U.S. 696, 713 (1966) (White, J., dissenting); Agency Holding Corp. v. Malley-Duff & Assoc., 107 S. Ct. 2759, 2763 (1987)(courts have not maintained a consistent approach to adopting appropriate statute of limitations). *Cf.* Tellis v. United States Fidelity & Guar. Co., 805 F.2d 741, 746 (7th Cir. 1986)(two-year limitations period for civil actions based on statutory penalty to be applied to all civil RICO claims in Illinois); Silverberg v. Thomson McKinnon Sec., Inc., 787 F.2d 1079 (6th Cir. 1986)(four-year statute of limitations for common law fraud applied on an *ad hoc* basis to a civil RICO action in Ohio); Hunt v. American Bank & Trust Co., 783 F.2d 1011 (11th Cir. 1986) (either a one-year limitation for common law fraud, or a two-year limitation for securities fraud to be applied on an *ad hoc* basis in Alabama); Durante Bros. & Sons v. Flushing Nat'l Bank, 755 F.2d 239 (2d Cir.) *cert. denied,* 105 S. Ct. 3530 (1985) (three-year limitation governing actions for penalty or forfeiture applied in New York); and Estee Lauder, Inc. v. Harco Graphics, Inc., 621 F.Supp. 689 (S.D.N.Y. 1984)(six-year limitations period for fraud borrowed).

6. 107 S. Ct. 2759 (1987).

the Supreme Court attempted to limit the complexity and confusion in civil RICO actions by holding that the four-year statute of limitations applicable to the Clayton Act[7] be applied uniformly to all civil RICO actions.[8] Although this decision eliminates the confusion over which limitations period applies in civil RICO actions, the decision also creates considerable confusion about the present status of the borrowing rule.

This note will first analyze the Court's application of the borrowing rule. Second, it will address how *Malley-Duff II* opens the door for expansion of the borrowing rule beyond its traditional scope. Finally, this case note will focus on policy reasons for closing the door on the expansive interpretation of *Malley-Duff II*.

I. MALLEY-DUFF II

In February of 1978, Crown Life Insurance Co. (Crown Life) terminated its relationship with its agent, Malley-Duff & Associates (Malley-Duff), for failure to satisfy a production quota. This termination resulted in two separate actions. The first, filed in April of 1978, alleged violations of federal antitrust laws and asserted a state claim for tortious interference with a contract.[9] The second, which is the focus of this case note, was a civil RICO action alleging that Agency Holding Corporation, Crown Life and several of Crown Life's employees formed an enterprise whose purpose was to acquire Malley-Duff's agency through false and fraudulent means.[10] Initially, *Malley-Duff I* and *Malley-Duff II* were consolidated, but only the RICO claim of *Malley-Duff II* was at issue before the Supreme Court.[11]

Crown Life's motion for summary judgment on the RICO claim was granted by the federal district court on the grounds that the claims were barred by Pennsylvania's two-year statute of limitations for fraud. The Court concluded that in the absence of a RICO statute of limitations, the two-year fraud statute was the best state law analogy.[12] The Court of Appeals for the Third Circuit reversed, holding that Pennsylvania's six-year,

---

7. 15 U.S.C. § 15b (1982).
8. 107 S. Ct. at 2767.
9. 107 S. Ct. at 2761.
10. *Id.*
11. *Id.*
12. *Id.* at 2761-62.

catch-all statute of limitations was the best analogy, and that the suit was therefore timely brought.[13]

On appeal to the United States Supreme Court, the Court affirmed that Crown Life's action was timely brought but additionally held that the Clayton Act's four-year statute of limitation should be followed uniformly in all civil RICO actions.[14]

II. ANALYSIS

A. *A Critical Analysis of the Reasoning in* Malley-Duff II

Following the approach developed in *Wilson v. Garcia*,[15] Justice O'Connor, writing for the majority, stated that when choosing an appropriate statute of limitations, "the initial inquiry is whether all claims arising out of the federal statute 'should be characterized in the same way, or whether they should be evaluated differently depending upon the varying factual circumstances and legal theories presented in each individual case.' "[16] Answering this first inquiry, the Court decided that all civil RICO claims should be characterized uniformly.[17]

The next inquiry under the *Wilson* test "is whether a federal or state statute of limitations should be used."[18] After making this second inquiry, the Court borrowed a federal limitations period. The following discussion will demonstrate that the decision in *Malley-Duff II* represents a significant departure from the traditional application of the borrowing rule.

1. *The Borrowing Rule*

The second inquiry under the *Wilson* test requires application of the borrowing rule. The general rule provides that a court should apply a limitations period from an analogous state cause of action to a federal cause of action unless the state pe-

13. *Id.* at 2762.

14. *Id.* at 2767.

15. 471 U.S. 261 (1985).

16. 107 S. Ct. at 2762 (quoting Wilson, 471 U.S. at 268).

17. *Id.* at 2763. This issue is not addressed in this case note as there appears to be ample support for the need for uniformity in civil RICO actions. For a more comprehensive look at the need for uniformity in civil RICO actions, see REPORT OF THE AD HOC TASK FORCE OF THE ABA SECTION OF CORPORATION, BANKING AND BUSINESS LAW 391 (1985); Note, *Statutes of Limitations in Civil RICO Actions After* Wilson v. Garcia, 55 FORDHAM L. REV. 529 (1987); and Note, *A Uniform Limitations Period for Civil RICO*, 61 NOTRE DAME L. REV. 495 (1986).

18. 107 S. Ct. at 2762.

riod is inconsistent with federal law or policy.[19] The preference for borrowing a state limitations period rests on the assumption that because Congress is aware of this longstanding practice, and has taken no action to change the practice, it can generally be assumed that Congress intends by its silence that federal courts borrow state law.[20] However, "[i]n some circumstances . . . state statutes of limitations can be unsatisfactory vehicles for the enforcement of federal law. In those instances, it may be inappropriate to conclude that Congress would choose to adopt state rules at *odds with the purpose or operation of federal substantive law.*"[21]

DelCostello v. International Brotherhood of Teamsters[22] is an example of a case in which the Court borrowed a federal rather than a state limitations period.[23] In *DelCostello*, the Court supported its position by referring to *Occidental Life Insurance Co. v. EEOC*,[24] *McAllister v. Magnolia Petroleum Co.*,[25] and *Holmberg v. Armbrecht*[26]—the only cases prior to *DelCostello* in which the Supreme Court deviated from the practice of borrowing a state limitations period. In each of these cases, the Court examined and rejected the proposed state limitations periods, and also enumerated specific reasons why the state limitations periods conflicted with the purpose or operation of the federal substantive law involved.[27]

---

19. Wilson. v. Garcia, 471 U.S. 261, 266-67 (1985); Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 464 (1975).

20. Agency Holding Corp. v. Malley-Duff & Assoc., 107 S. Ct. 2759, 2762 (1987); *see* DelCostello v. International Bhd. of Teamsters, 462 U.S. 151, 158 n.12 (1983).

21. *DelCostello*, 462 U.S. at 161 (emphasis added).

22. 462 U.S. 151 (1983).

23. The Court borrowed the six-month statute of limitations from section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b) (1982).

24. 432 U.S. 355 (1977).

25. 357 U.S. 221 (1958).

26. 327 U.S. 392 (1946).

27. In *Occidental Life*, 432 U.S. 355 (1977), a case involving a violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1976), the EEOC filed suit pursuant to an individual's claim of employment discrimination after a three-year EEOC investigation and conciliation. The district court held the action was barred by a borrowed one-year California statute of limitations. Subsequently, the Supreme Court reversed the district court because the short one-year statute of limitations would frustrate the policy of informally resolving employment discriminations, and that such a short statute of limitations would unduly hinder the policy of the Act by placing too great of an administrative burden on the agency.

In *McAllister*, 357 U.S. 221 (1958), an action involving a claim for negligence under the Jones Act, 46 U.S.C. § 688 (1956), and a claim for unseaworthiness under general maritime law, the doctrine of collateral estoppel required that the two actions be brought

Similarly, before borrowing a federal limitations period, the *DelCostello* Court examined the proposed state limitations periods individually, and concluded that the "state limitations periods . . . fail to provide an aggrieved employee with a satisfactory opportunity to vindicate his rights . . . ."[28] The Court reasoned that Maryland's thirty-day[29] and New York's ninety-day[30] statute of limitations for actions to vacate arbitration awards were too short for an employee "to evaluate the adequacy of the union's representation, to retain counsel, to investigate substantial matters that were not at issue in the arbitration proceedings and to frame his suit."[31]

These cases demonstrate that the Court has consistently required some sort of conflict between the state limitation periods and the purpose or operation of federal substantive law before it has been willing to turn away from borrowing a state limitations period. This requirement will be hereinafter referred to as the "state/federal conflict requirement."

The *DelCostello* Court set forth a two-prong test, summarizing the circumstances under which the Court has found it appropriate to deviate from the norm of borrowing a state limitations periods as follows:

> [R]esort to state law remains the norm for borrowing of limitations periods. Nevertheless, [a court will adopt a federal rather than a state statute of limitations] [1] when a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, *and* [2] when [a] the federal policies at stake *and* [b] the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking . . . .[32]

---

simultaneously. The state courts held that the two-year statute of limitations for personal injury barred the unseaworthiness claim. Consequently, the Jones Act claim would have been barred as well, which would ultimately deprive the plaintiff of the full benefit of federal law. Accordingly, the Supreme Court held that the plaintiff's rights under the federal claim could not be limited by the shorter state limitations period.

In *Holmberg*, the Court rejected the proposed state limitations period, holding that state statutes of limitations would not apply to federal causes of action lying solely in equity because the principles of federal equity are hostile to the "mechanical rules" of statutes of limitations. DelCostello v. International Bhd. of Teamsters, 462 U.S. 151, 162 (1983) (quoting *Holmberg*, 327 U.S. at 396).

28. *DelCostello*, 462 U.S. at 166.

29. MD. CTS & JUD. PROC. CODE ANN. § 3-224 (1980).

30. N.Y. CIV. PRAC. L. & R. 7511(a) (McKinney 1980).

31. *DelCostello*, 462 U.S. at 166.

32. *Id.* at 171-72 (numbering and emphasis added).

Implicit in the second prong of the test is a requirement that the state limitations periods conflict with the purpose or operation of federal substantive law. In other words, in order for a federal limitations period to be considered "significantly more appropriate" than the available state limitation periods, a court must first meet the state/federal conflict requirement.

Thus, until *Malley-Duff II*, there was a presumption in favor of borrowing a state limitations period and the Court was unwilling to depart from the practice of borrowing a state limitations period unless it was first established that the alternative federal rule is "significantly more appropriate" than each of the state limitations periods. In all of the Supreme Court cases where this burden was met, the analogous state statutes were shown to be at odds with the purpose or operation of federal substantive law.

2. *The Borrowing Rule Under Malley-Duff II*

The majority in *Malley-Duff II* held "that the Clayton Act clearly provides a far closer analogy than any available state statute, and that the federal policies that lie behind RICO and the practicalities of RICO litigation make the selection of the 4-year statute of limitations . . . the *most appropriate* limitations period for RICO actions."[33]

Although Justice O'Connor cites the *DelCostello* test as support for the Court's decision,[34] and despite the fact that the Court's holding resembles an application of the *DelCostello* "significantly more appropriate" test, the analysis in *Malley-Duff II* is inconsistent with the *DelCostello* interpretation of the borrowing rule. From Justice O'Connor's analysis, the majority appears to advocate a new test for the adoption of a federal limitations period—the "*most* appropriate" test.[35] In sharp contrast to

---

33. Agency Holding Corp. v. Malley-Duff & Assoc., 107 S. Ct. 2759, 2767 (1987) (emphasis added).

34. *Id.* at 2763.

35. The Court did not conclude that the four-year provision of the Clayton Act is *significantly more appropriate* than the available state statute of limitations, rather the Court held that it was the *most appropriate* limitations period for civil RICO actions. Although Justice O'Connor stated that "[t]he federal policies at stake and the practicalities of litigation strongly *suggest* that the limitations period of the Clayton Act is a significantly more appropriate statute of limitations than any state limitations period" *Malley-Duff*, 107 S. Ct. at 2765 (emphasis added), the Court failed to support this statement and ultimately held that the Clayton Act provides the most appropriate limitations, not that the four-year provision of the Clayton Act is significantly more appropri-

the *DelCostello* "significantly more appropriate" test, the *Malley-Duff II* "most appropriate" test only requires that the federal limitations period provide the most appropriate analogue to the federal cause of action in issue. This reading of the case is supported by the following points derived from an examination of the mechanics of the majority opinion.

The majority opinion in *Malley-Duff II* suggests that given the unique nature of RICO, there is no satisfactory state law analogue.[36] Justice O'Connor supports this assertion by noting that the predicate acts that may establish racketeering activity under RICO are far-ranging, and cannot be reduced to a single generic characterization.[37] "Moreover, RICO is designed to remedy injury caused by a pattern of racketeering, and '[c]oncepts such as RICO "enterprise" and "pattern of racketeering activity" were simply unknown to common law.' "[38] Consequently, implicit in the remainder of the majority's analysis is an underlying attitude that civil RICO presents a situation which warrants special treatment.

In accordance with this underlying support for special treatment, Justice O'Connor goes into considerable detail in an effort to establish that the Clayton Act provides a closer analogy to civil RICO than any other state alternative,[39] while the state/federal conflict requirement[40] set forth in the second prong of the *DelCostello* test is dismissed with little more than the following observations.

First, Justice O'Connor writes that "[w]ith the possibility of multiple state limitations, the use of state statutes would present the danger of forum shopping and, at the very least, would

---

ate. *See infra* text accompanying notes 38-45.

36. *See Malley-Duff*, 107 S.Ct at 2765. Although not the focus of this case note, Justice O'Connor's conclusion is not persuasive. Twenty-seven states have passed RICO-type statutes including the following: Arizona, California, Connecticut, Colorado, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Louisiana, Mississippi, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, Utah, Washington, and Wisconsin. Blakey & Cessar, *Equitable Relief Under Civil RICO: Reflections on Religious Technology Center v. Wollersheim: Will Civil RICO be Effective Only Against White-Collar Crime?*, 62 NOTRE DAME L. REV. 526, 596 (1987) (Appendix A: Comparative Analysis of State RICO legislation).

37. *Malley-Duff*, 107 S. Ct. at 2763.

38. *Id.* at 2764 (citing Agency Holding Corp. v. Malley-Duff & Assoc., 792 F.2d 341, 348 (3d Cir. 1986)).

39. *See id.* at 2764-66.

40. *See supra* notes 31-32 and accompanying text.

'virtually guarante[e] . . . complex and expensive litigation over what should be a straightforward matter.' "[41] Second, "application of a uniform federal limitations period avoids the possibility of the application of unduly short state statutes of limitation that would thwart the legislative purpose of creating an effective remedy."[42]

Justice O'Connor's first assertion is not persuasive because the Supreme Court has previously held, albeit in other contexts, that lack of uniformity does not sufficiently frustrate federal policy so as to mandate the borrowing of a federal limitations period.[43] Additionally, the problem with forum shopping is not unique to civil RICO actions. Should the possibility of forum shopping be significant enough to warrant borrowing a federal limitations period in this situation, it would also warrant borrowing a federal limitations period for almost every federal statute not providing an express limitations period.[44]

Moreover, many states have passed statutes which curtail the ability to forum shop by requiring that the limitations period of the state in which the cause of action "arose," "accrued," or "occurred" be borrowed.[45] Accordingly, the states are making strides towards eliminating the forum shopping problem.

The majority's second assertion is also unpersuasive. Unlike the Supreme Court's approach in *DelCostello*[46] a case which also rejected the borrowing of state limitations periods because they were too short, the Court failed to discuss any specific reasons why a two-year provision was so short that it conflicted with the federal substantive policies underlying a civil RICO action, nor identify any specific state limitations period that the Court considered too short.[47]

---

41. *Malley-Duff*, 107 S. Ct. at 2766.

42. *Id.* at 2766.

43. *See* Board of Regents v. Tomanio, 446 U.S. 478, 489 (1980). ("[t]he need for uniformity . . . has not been held to warrant the displacement of state statutes of limitations for civil rights actions"); UAW v. Hoosier Cardinal Corp., 383 U.S. 696, 701-03 (1966)(lack of uniformity in applicable statute of limitations does not frustrate in any important way the achievement of any significant goal of labor policy).

44. *Malley-Duff*, 107 S. Ct. at 2773 (Scalia, J., concurring).

45. *See, e.g.*, CAL. CIV. PROC. CODE § 361 (West 1954); COLO. REV. STAT. § 13-80-118 (1974); IDAHO CODE § 5-239 (1979); KY. REV. STAT. ANN. § 413.320 (Michie/Bobbs-Merrill 1979); MO. REV. STAT. § 516.190 (1978); NEV. REV. STAT. § 11.020 (1979); UTAH CODE ANN. § 78-12-45 (1953).

46. *See supra* notes 28-31 and accompanying text.

47. For a comprehensive review of the consideration on length of time, see Note, *Statute of Limitations in Civil Rico Actions After* Wilson v. Garcia, 55 FORDHAM L. REV.

The most dispositive evidence of a departure from the *DelCostello* "significantly more appropriate" test is found in the majority's response to Justice Scalia's assertion (in his concurring opinion) that the state limitations periods must be at odds with federal rights in order to justify a deviation from the norm of borrowing a state limitations period. The majority states that "[i]n our view the practicalities of RICO litigation present equally compelling reasons for federal preemption of otherwise available state statutes of limitations . . . ."[48] Thus, the Majority rejects the state/federal conflict requirement in the second prong of the *DelCostello* test.[49]

In summary, the majority opinion does not comport with the *DelCostello* test. Justice O'Connor focuses on the uniqueness of a civil RICO action, as well as the similarity in legislative history behind the Clayton Act and civil RICO, but fails to adequately develop any conflict or inconsistencies between the state limitations periods and the legislative purpose of civil RICO. Moreover, the majority dismisses the need to show any such conflict by stating that the practicalities of litigation present sufficiently compelling reasons to preempt application of state limitation periods. *Malley-Duff II* expands the borrowing rule by directing the courts to borrow the "most appropriate" limitations period, be it state or federal.[50]

B. Opening the Door

The decision in *Malley-Duff II* opens the door for an expansion of the borrowing rule beyond its traditional scope. The Court found that the practicalities of litigation—uniformity, avoidance of forum shopping and unduly short state limitation periods—were compelling reasons for the preemption of state limitations periods. If these practicalities of litigation are compelling enough to preempt otherwise available state limitations periods, then an analogous federal limitations period will nearly always be more appropriate than an analogous state limitations

---

529 (1987).

48. *Malley-Duff*, 107 S. Ct. at 2765-66.

49. *See supra* note 32 and accompanying text.

50. Justice Scalia stated in his concurring opinion that the majority's decision transforms the borrowing rule "from a presumption that congressional silence means that we should apply the appropriate *state* limitations period into a presumption that congressional silence means we should apply the appropriate limitations period, *state or federal*." *Malley-Duff*, 107 S. Ct. at 2772 (Scalia, J., concurring) (emphasis in original).

period. Federal limitations periods should always provide the advantage of uniformity, avoid forum shopping and not be unduly restrictive because state limitations periods for different classifications of actions will always vary from state to state.[51]

However, one obstacle to the wide spread application of *Malley-Duff II*'s expansive interpretation of the borrowing rule is the argument that the Court's interpretation of the rule was developed in a unique factual situation.[52] Another obstacle is the argument that since the Court did not believe there was an adequately analogous state statute, the Court did not depart from the traditional borrowing rule because there were no state limitations periods with which to compare the federal limitations periods.

Nevertheless, these obstacles can be overcome. *Malley-Duff II* does not represent the first time the Court has faced a unique federal statute, or a federal statute having no analogue under state law. "On the contrary, as the courts have often discovered, there is not always an obvious state-law choice for application to a given federal cause of action . . . ."[53]

For example, in *Wilson v. Garcia* the Court was required to determine what limitations period to apply to a section 1983[54] action.[55] The *Wilson* Court classified a section 1983 action as a *unique* federal remedy.[56] Section 1983 claims present problems similar to civil RICO actions, as section 1983 involves a catalog of claims that "would encompass numerous and diverse topics and subtopics . . . [and one] could almost always argue, with considerable force, that two or more periods of limitations should apply to each section 1983 claim."[57] However, despite the unique nature of a section 1983 action, the Court, in contrast to their action in *Malley-Duff II*, did not turn to federal law, but instead selected a uniform characterization to be applied in each state.

Hence, one could argue that since the Court's prior decisions have not deviated from the normal practice when faced with very unique federal actions similar to civil RICO, the

---

51. *Malley-Duff*, 107 S. Ct. at 2773 (Scalia, J., concurring).
52. *See supra* notes 37-39 and accompanying text.
53. DelCostello v. International Bhd. of Teamsters, 462 U.S. 151, 171 (1983).
54. 42 U.S.C. § 1983 (1982).
55. 471 U.S. 261 (1985).
56. *Id.* at 272 (emphasis added).
57. *Id.* at 273-74.

Court's decision in *Malley-Duff II* can be interpreted as an expansion of the borrowing rule beyond its traditional scope.

1. *An Example of the Expansive Interpretation*

Malley-Duff II seems to invite the application of the Court's expansive interpretation of the borrowing rule to other causes of action where there is a need for uniformity.

For example, there is considerable confusion about what limitations period applies to a cause of action alleging misrepresentation in the sale of securities under SEC Rule 10b-5.[58] Depending upon the circuit, the courts will generally borrow a limitations period from either the state's Blue Sky or fraud laws.[59] Unfortunately, the limitations periods vary considerably in length from state to state.[60]

Similar to civil RICO cases, 10b-5 cases often involve interstate transactions, and conceivably the statute of limitations of several states could govern any given 10b-5 claim. Indeed, similar to civil RICO, some nexus to interstate commerce is required as a jurisdictional element of a 10b-5 claim.[61]

Following Justice O'Connor's analysis in *Malley-Duff II*, the multistate nature of Rule 10b-5 indicates the desirability of a uniform federal statute of limitations. With the possibility of multiple state limitations, the use of a federal limitations period would prevent the danger of forum shopping and avoid the possibility of unduly short state statutes of limitations that would thwart the purpose of creating an effective remedy.[62] Consequently, a court should strongly consider borrowing a limitation period from an analogous federal statute[63].

C. *Closing the Door on Expansion of the Borrowing Rule*

An expansive interpretation of *Malley-Duff II* should be rejected because it (1) invites a court to assume a legislative pos-

---

58. *See* Martin, *Statutes of Limitation in 10b-5 Actions: Which State Statute is Applicable?*, 29 BUS. LAW. 443 (1974).

59. T. HAZEN, THE LAW OF SECURITIES REGULATION 477 (1985).

60. *Id.*

61. General Rules and Regulations, Securities Exchange Act of 1934, 17 C.F.R. § 240.10b-5 (1978) (promulgated pursuant to section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j (1982)).

62. Agency Holding Corp. v. Malley-Duff & Assoc., 107 S. Ct. 2759, 2766 (1987).

63. "The weight of scholarly authority favors application of the 1933 Act's statute of limitations." T. HAZEN, *supra* note 59 at 476.

ture in determining which limitations period to apply, and (2) an expansive interpretation will cause even more confusion among the courts.

The practice of borrowing a limitations period can be pursued passively or actively.[64] The passive approach involves: (1) an examination into the nature of the federal cause of action, (2) an examination of the state's catalog of limitations and (3) a determination by the court of which statute would apply to a similar state claim.[65] This is basically an approach requiring the classification of the nature of the action—for example, whether the action lies in tort or contract. Once this question is answered, the court need only apply the limitations period provided by the state's legislature to meet the actions that arise in that general category or classification of action.

The active approach includes the first two steps of the passive approach. However, a court assumes a more legislative posture in determining which statute to apply by weighing factors deserving consideration, such as social, economic and political policies, and then selecting the statute which best reflects these considerations.[66]

An expansive interpretation of *Malley-Duff II* mandates an active approach. Federal statutes are generally tied to a specific cause of action, and are not intended to address a general classification of actions.[67] Thus, in considering whether to apply a federal statute which does not apply by its terms, the courts must engage in the legislative function of weighing various policy considerations. Under an expansive interpretation of *Malley-Duff II*, once a court perceives a need for uniformity, it can simply seize the opportunity to overstep its bounds and legislate.[68]

An expansive interpretation of *Malley-Duff II* should be rejected in order to restrict the ability of a court to make legislative determinations. The weighing of social, economic and political policies is the type of judgment to be made by the legislatures and not the courts.[69] Moreover, legislatures are bet-

---

64. Note, *Limitation Borrowing in Federal Courts*, 77 MICH. L. REV. 1127, 1136 (1979).

65. *Id.*

66. *Id.* at 1136-37.

67. *Malley-Duff*, 107 S. Ct. at 2773 (Scalia J., concurring).

68. *See Wilson*, 471 U.S. at 284 (O'Connor, J., dissenting) (Justice O'Connor argued that the Court was overstepping its bounds in creating a uniform characterization of a section 1983 action for state law borrowing).

69. *Malley-Duff*, 107 S. Ct. at 2774 (Scalia, J., concurring); Moviecolor Ltd. v. East-

ter able to make these types of decisions as they, unlike a court, may hold hearings in which all interested persons may present evidence and testimony on these issues, as well as appoint special panels and commissions to investigate the issues. Furthermore, an expansive interpretation could actually increase the complexity of litigation because courts are able to freely choose not only from the available state limitations periods, but also from a wide range of federal rights.[70] Consequently, the likelihood of inconsistent analogies from court to court would be greater under an expansive rather than a restrictive interpretation of *Malley-Duff II*.[71]

III. CONCLUSION

The present status of the borrowing rule is uncertain. *Malley-Duff II* appears to eliminate the presumption in favor of borrowing a state limitations period by changing the focus of a court's inquiry to borrowing the most appropriate limitations period, whether it be state or federal. One obstacle to the general precedential value of *Malley-Duff II* is the unique nature of RICO. Should this obstacle be overcome, there is a viable argument that the Court has departed from the traditional borrowing rule. Nevertheless, the policy consideration of limiting judicial legislation favors limiting the expansion of the borrowing rule.

Michael H. Coons, Sr.

---

man Kodak Co., 288 F.2d 80, 83 (2d Cir. 1961)("selection of a period of years [is] not the kind of thing judges do").

70. Special Project, *Time Bars in Specialized Federal Common Law: Federal Rights of Action and State Statutes of Limitations*, 65 CORNELL L. REV. 1011, 1081 (1980).

71. *Id.*